RHB BANK BHD

v.

KAWOOD SDN BHD & ORS AND ANOTHER SUIT

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-60-2000 & 22-43-2000]
30 AUGUST 2001

CIVIL PROCEDURE: *Writ of summons - Service - Whether within jurisdiction - Whether court proper forum conveniens - Courts of Judicature Act 1964, s. 23(1)(c)*

CIVIL PROCEDURE: *Writ of summons - Indorsement - Whether there was non-compliance with statutory provisions - Whether mere irregularity and curable by court - Rules of the High Court 1980, O. 2 rr. 1, 2, O. 6 r. 2(1)(b), O. 18 r. 6(4)*

CIVIL PROCEDURE: *Service - Writ of summons - Copy of writ served not sealed - Whether ought to be set aside - Rules of the High Court 1980, O. 62 r. 3*

The plaintiff, a licensed bank, commenced action against the defendants claiming that the defendants were in breach of their respective obligations to it under the banking facilities and guarantee agreements granted to them. The plaintiff caused to be issued out of the Registry of the High Court at Sibu, Sarawak, a writ of summons with a statement of claim indorsed thereon. Hence, these applications by the defendants seeking to set aside the writ of summons and the service thereof on them.

Held:

[1] Both the cause of action and the facts on which both actions were based occurred in Sibu within the meaning of s. 23(1)(c) of the Courts of Judicature Act 1964. Hence, the plaintiff was entitled to file both these actions in the High Court in Sibu, Sarawak. Furthermore, the forum which had the most real and substantial connection with these cases was Sibu. (pp 393 i, 394 a & 400 g)

[2] As the statement of claim found indorsed on the writ already contained a statement of the amount claimed from the defendants of the debt or liquidated demand allegedly payable by them, there could be no requirement to also make an indorsement in accordance with

the provisions of O. 6 r. 2(1)(b) of the Rules of the High Court 1980 ('RHC'), because what was found in the statement of claim indorsed on the writ already satisfied that requirement. (p 403 g-h)

[2a] The plaintiff's non-compliance of the second limb of O. 6 r. 2(1)(b) of the RHC gave rise to an irregularity in the proceedings which was curable by the court, and the absence of an application by the plaintiff to cure the irregularity would not prevent the court from exercising its jurisdiction under O. 2 r. 1 of the RHC as the court may exercise that power on the facts, materials and circumstances revealed in each case when an application to strike out the particular proceeding is made to the court by the party complaining about such irregularity under O. 2 r. 2 of the RHC, such as in this case. (p 408 a-d)

[2b] The provisions of O. 18 r. 6(4) of the RHC would not apply where the statement of claim was found indorsed on a writ because it had become part of the writ on which it was indorsed, and the writ would bear an indorsement as to the firm of solicitors which issued the writ and their business address. The provisions of O. 18 r. 6(4) would only apply to a statement of claim which is being served on its own as a pleading. (pp 409 h-i & 410 a)

[3] There was no requirement under O. 62 r. 3 of the RHC to serve the defendants with a sealed copy of the writ – the defendants need only be shown the sealed copy if they had requested for it to be shown to them. (pp 411 i & 412 a)

[Applications dismissed.]

Case(s) referred to:

American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 ***(refd)***

Arab-Malaysian Merchant Bank Bhd v. Dominance Resources Sdn Bhd & Anor [2002] 5 CLJ 1 ***(foll)***

Brinkerhoff Maritime Drilling Corp & Anor v. PT Airfast Services Indonesia and Another Appeal [1992] 2 SLR 776 ***(refd)***

Dayasar Corp Sdn Bhd v. CP Ng & Co Sdn Bhd [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11 ***(refd)***

Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 ***(refd)***

Lai Yoke Ngan v. Chin Teck Kwee [1997] 3 CLJ 305 ***(foll)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 ***(foll)***

Nicholls v. Nicholls [1997] 147 NLJ 61 ***(refd)***

Sino Pac Development (Thailand) Ltd v. Patrick Yap Huan Ju [1997] 4 CLJ Supp 164 ***(refd)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(dist)***
Sogelease Advance (Malaysia) Sdn Bhd v. Kemajuan Tat Young Sdn Bhd & Ors [1999] 5 CLJ 331 ***(refd)***
United Malayan Banking Bhd v. Chew Chee Sun [1996] 3 CLJ 533 ***(dist)***

Legislation referred to:
Bankruptcy Act 1967, s. 93(7)
Bankruptcy Rules 1969, s. 101
Courts of Judicature Act 1964, ss. 3, 23(1)(a), (b), (c), (d)
Federal Constitution, art. 121
Rules of the High Court 1980, O. 2 rr. 1(2), 2, O. 6 r. 2(1)(a), (b), 6(2), (3), O. 14, O. 18 r. 6(1)(a), (b), (4), O. 32 r. 13(2)(b), O. 62 r. 3(a)

Other source(s) referred to:
Atkin's Court Form, vol 1, 1992 Issue
Halsbury's Laws of England, 4th edn, vol 37

(Suit No: 22-60-2000)
For the plaintiff - Frank Tang; M/s Tang & Partners
For the defendants - Idris Abdullah (Sapuan Ahmad); M/s Idris & Co

(Suit No: 22-43-2000)
For the plaintiff - Frank Tang; M/s Tang & Partners
For the defendants - Idris Abdullah (Sapuan Ahmad); M/s Idris & Co

Reported by Suresh Nathan

JUDGMENT

Clement Skinner J:
This is the hearing of three applications (in encls. 14, 26 and 39) made by the 1st, 2nd and 3rd defendants in Suit 22-60-2000 and one application (in encl. 15) made by the 2nd defendant in Suit 22-43-2000. At the request of counsel, they were heard together as they raise common issues and in some of the written submissions handed in, the applications in both suits were addressed in one submission.

In each suit, the plaintiff, a licensed bank, granted banking facilities to the 1st defendant named therein. In respect of Suit 22-60-2000, the 1st defendant therein was granted banking facilities in the sum of RM5,000,000 upon the terms and conditions set out in a letter of offer dated 9 September 1996. The 2nd and 3rd defendants named in the aforementioned suit stood as guarantors to the banking facilities granted to the 1st defendant. On 31 May 2000, the plaintiff claiming that the 1st, 2nd and 3rd defendants were in breach of their respective obligations to it under the banking facilities and guarantee agreements respectively, commenced Suit 22-60-2000 against them.

In Suit 22-43-2000, the 1st defendant named therein was granted banking facilities in the sum of RM11,000,000 upon terms and conditions set out in four letters of offer dated 3 December 1994, 13 December 1994, 27 March 1995 and 27 March 1996 respectively. The 2nd defendant named in the aforementioned suit stood as guarantor to the banking facilities granted to the 1st defendant. On 19 April 2000, the plaintiff claiming that the 1st and 2nd defendants were in breach of their respective obligations to it under the banking facilities and guarantee agreements respectively, commenced Suit 22-43-2000 against them.

In each of the above suits, the plaintiff caused to be issued out of the registry of the High Court at Sibu, Sarawak, a writ of summons with a statement of claim indorsed thereon. On being served, the 1st, 2nd and 3rd defendants in Suit 22-60-2000 each entered a conditional appearance in the action so as to be able to make these applications (ie, encls. 14, 26 and 39) and in Suit 22-43-2000 the 2nd defendant only entered a conditional appearance in the action so as to be able to make the application in encl. 15.

The defendants in both suits seek to set aside the writ of summons and the service thereof on them on the following grounds:

(a) The High Court in Sabah and Sarawak at Sibu has no jurisdiction to hear and adjudicate these actions and is also not the proper forum to try and adjudicate the same. This ground is relied upon by the 2nd and 3rd defendants in Suit 22-60-2000 and by the 2nd defendant in Suit 22-43-2000.

(b) There had been failure by the plaintiff to comply with both limbs of O. 6 r. 2(1)(b) Rules of the High Court 1980 (hereafter 'the RHC'). This ground is relied upon by all three defendants in Suit 22-60-2000 and by the 2nd defendant in Suit 22-43-2000.

(c) There had been failure by the plaintiff to comply with O. 18 r. 6(1) RHC. This ground is relied on by all three defendants in Suit 22-60-2000 and by the 2nd defendant in Suit 22-43-2000.

(d) The purported service of the writ ought to be set aside as they were not served with a sealed copy of the writ. This ground is relied on by all three defendants in Suit 22-60-2000 and by the 2nd defendant in Suit 22-43-2000.

In support of their contention that the High Court in Sibu has no jurisdiction to hear and adjudicate these actions, the 2nd and 3rd defendants in Suit 22-60-2000 and the 2nd defendant in Suit 22-43-2000 rely upon the following grounds:

(a) The plaintiff has its registered office and head office in Kuala Lumpur and from its pleadings, it appears that the plaintiff has a place of business in Kuala Lumpur.

(b) The 2nd defendant (in both suits), a businessman, is a director of the 1st and 3rd defendants in Suit 22-60-2000 and the 1st defendant in Suit 22-43-2000, resides at 2109, HR2, Riana Green, Jalan Tropicana Utara, 47410 Tropicana, Petaling Jaya, Selangor Darul Ehsan, West Malaysia. He also has his offices at Unit 602B, Level 6, Tower B, Uptown 5, 5 Jalan SS21/39, 47400 Damansara Uptown, Selangor Darul Ehsan, West Malaysia, which is the registered and business address of a company called Pan Pacific Asia Berhad ('PPAB') of which he is an active director.

(c) Since 11 February 2000 the 3rd defendant in Suit 22-60-2000 has its registered and principal place of business at the latter mentioned address in (b) above and its principal officers, records and documents are located there; it is from there that all its business activities are undertaken, managed and run by its personnel involved in each of those processes.

(d) Since 11 February 2000 the 3rd defendant in Suit 22-60-2000 does not operate in Sibu, Sarawak and does not have a branch there. Before that date, its registered address was in Johore Bahru, Johore, West Malaysia.

(e) Other than being his own witness in both suits, the 2nd defendant is likely to be a witness for the 1st and 3rd defendants as well in Suit 22-60-2000 and for the 1st defendant in Suit 22-43-2000.

(f) In Suit 22-60-2000, the letter offering the banking facilities to the 1st defendant was issued and signed by two officers of the plaintiff's head office in Kuala Lumpur; and in Suit 22-43-2000, three out of the four letters of offer of the banking facilities came from the plaintiff's head office in Kuala Lumpur and signed by the plaintiff's officers from there.

(g) The plaintiff's Sibu branch was merely used as a conduit for the disbursement of the banking facility concerned in each suit and for administrative matters of the facility concerned.

(h) The plaintiff's letters terminating the banking facilities and demanding repayment of the facility and under the guarantees referred to in both suits were issued by Messrs. Shook Lin & Bok, a legal firm based in Kuala Lumpur.

Based on what is set out above, it was the submission of counsel for the 2nd and 3rd defendants in Suit 22-60-2000 and the 2nd defendant in Suit 22-43-2000 that the plaintiff's cause of action against them arose in Selangor Darul Ehsan, West Malaysia as:

(i) the plaintiff's cause of action against them is based on their refusal to meet the demands made on them under their guarantees,

(ii) the demands for payment under the guarantees were issued from Kuala Lumpur by a law firm there, acting on behalf of the plaintiff,

(iii) the defendants being based in Kuala Lumpur, their refusal to meet the demands happened in Selangor Darul Ehsan: the plaintiff's cause of action against them, therefore, arose in Selangor Darul Ehsan, West Malaysia.

It was further submitted on behalf of the defendants that the facts on which the proceedings in both suits are based occurred in Kuala Lumpur as:

(i) the banking facilities were offered and granted by the plaintiff's head office in Kuala Lumpur, with the letter of offer being signed by officers of the plaintiff's head office;

(ii) the firm of lawyers acting on behalf of the plaintiff, threatening to recall the facility concerned from the 1st defendant in both suits (Messrs. Nik Saghir, & Ismail) is a Kuala Lumpur firm; and

(iii) the law firm which acted for the plaintiff to terminate the banking facilities and issue the letters of demand in both suits was based in Kuala Lumpur (ie, Messrs. Shook Lin & Bok).

Counsel for the defendants submitted, therefore, that in the circumstances, only the High Court in Malaya, especially the High Court in Malaya at Shah Alam, has jurisdiction to adjudicate the actions herein, not the High Court in Sibu, Sarawak.

As far as the law is concerned, counsel for the defendants drew attention to s. 3 of the Courts of Judicature Act 1964 under which the High Court means the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may be. Counsel then referred to art. 121 of the Federal Constitution which provides that there are only two High Courts in our nation, namely the High Court in Malaya for the States of Malaya and the High Court in Sabah and Sarawak for the States of Sabah and Sarawak. Counsel then referred to the case of *Fung Beng Tiat v. Marid Construction Co.* [1997] 2 CLJ 1 where the Federal Court said this about art. 121 of the Constitution, at p. 7:

> ... it is crystal clear from art. 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory.

Relying on what is stated in that judgment about the two High Courts exercising distinct territorial jurisdiction over disputes that arise within its territory, it is the submission of counsel for the defendants that as the cause of action against them emanate from Kuala Lumpur and/or Selangor Darul Ehsan, it is the High Court of Malaya which is clothed with jurisdiction to adjudicate the actions herein and not the High Court of Sabah and Sarawak.

Learned counsel for the plaintiff did not see the question of jurisdiction in the same light as counsel for the defendants. According to counsel for the plaintiff, whether the High Court in Malaya or the High Court in Sabah and Sarawak has jurisdiction over a dispute or case is determined by whether the criteria in s. 23(1)(a) or (b) or (c) or (d) of the Courts of Judicature Act 1964 (hereafter 'the CJA') is satisfied. It is possible, according to counsel, that both courts may have jurisdiction over a dispute (as illustrated in the case of *Sogelease Advance (Malaysia) Sdn. Bhd. v. Kemajuan Tat Young Sdn. Bhd. & 4 Ors.* [1999] 5 CLJ 331), in which event the doctrine of *forum non conveniens* may be resorted to to decide the more appropriate forum to hear the case. It was his submission, however, that the High Court, Sibu, does have jurisdiction to hear these cases under s. 23(1)(b) CJA as the 1st defendant in both suits has its place of business within the local jurisdiction of this court.

Learned counsel for the plaintiff also submitted that, contrary to the contention of the defendants, the cause of action against them did not arise at or emanate from Selangor Darul Ehsan as alleged. Counsel points out that as far as the 2nd defendant in both suits is concerned, the letters of demand under the guarantee were addressed to him at No. 25, Upper Lanang Road, 96000 Sibu, Sarawak and any failure to pay arose in Sibu. Hence, the cause of action against him arose in Sibu. As for the 3rd defendant in Suit 22-60-2000, the letter of demand was addressed to it at Suite 6.2, Level 3, Menara Pelangi, Jalan Kuning, Johore Bahru and any refusal to pay would have arisen there. The cause of action against it did not, therefore, arise at Selangor Darul Ehsan as alleged. Counsel for the plaintiff further submitted that the venue for payment of the sum guaranteed in both suits is Sibu and the breach of the agreement to pay the sum guaranteed occurred in Sibu as well. Hence, not only the cause of action but also the facts on which both actions are based occurred in Sibu within

the meaning of sub-para. (c) of s. 23(1) CJA. It was the submission of counsel for the plaintiff, therefore, that the plaintiff was entitled to file both these actions in the High Court in Sibu, Sarawak.

I must say I find merit in the arguments of counsel for the plaintiff. In my judgment, the question of jurisdiction in this case is to be decided by reference to the provisions of s. 23(1) of the Courts of Judicature Act 1964 (hereafter 'the CJA') which provides that:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) the cause of action arose, or
>
> (b) the defendant or one of several defendants resides or has his place of business, or
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
>
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

The term "local jurisdiction" of the court is defined in s. 3 CJA to mean in the case of the High Court in Malaya, the territories comprising the States of Malaya, and in the case of the High Court in Sabah and Sarawak, the territories comprised in the States of Sabah, Sarawak and the Federal Territory of Labuan.

In my judgment, s. 23(1)(b) CJA confers on the High Court in Sabah and Sarawak at Sibu the jurisdiction to hear these cases as the 1st defendant in each suit has a place of business at 153, 2nd Floor, Jalan Kampong Nyabor, 96000 Sibu and at No. 2B, 2nd Floor, Brooke Drive, Sibu respectively, which is within the local jurisdiction of the High Court in Sabah and Sarawak.

Counsel for the defendants has submitted that it would be wrong for this court to hold, as I have above, that s. 23(1)(b) confers jurisdiction on this court to try these cases because, according to him, s. 23(1)(b) ought to be construed as conferring jurisdiction ONLY IF the cause of action against ALL the defendants in a particular suit are similar/overlapping and arose within the local jurisdiction of the court. According to counsel, this is the construction that MUST be put on s. 23(1)(b) CJA so as to give it a harmonious reading with the decision in *Fung Beng Tiat*'s case read with

art. 121 of the Constitution and s. 23(1)(a) and s. 3 CJA which, when so read together establishes that (a) the High Court in Malaya and the High Court in Sabah and Sarawak have separate and distinct jurisdictions; and (b) no High Court in Sabah/Sarawak can assume jurisdiction of a matter arising from a dispute or cause of action which emanates from Malaya.

I regret I am unable to agree with the construction put on s. 23(1)(b) by counsel for the defendants. In the first place, *Fung Beng Tiat*'s case concerned a debtor who was ordinarily resident in Sandakan, Sabah but bankruptcy proceedings instituted against him in Kuala Lumpur, contrary to s. 101 of the Bankruptcy Rules. When the debtor's opposition to the petition came up before the learned High Court judge, he held that the debtor had, by engaging counsel in Kuala Lumpur, submitted to the jurisdiction of the Kuala Lumpur High Court and, even though s. 101 of the Bankruptcy Rules had not been complied with, no injustice had been occasioned to the debtor as the Kuala Lumpur High Court had the power (under s. 93(7) of the Bankruptcy Act 1967), to transfer the proceedings to the High Court in Sabah and Sarawak.

It was in the light of the learned High Court judge's failure to recognise that the facts before him gave rise to the issue of the territorial jurisdiction and authority of the two High Courts in Malaysia that the Federal Court pointed out that there was no power for the High Court in Malaya to transfer any proceeding to the High Court in Sabah and Sarawak and *vice versa* because under art. 121 of the Constitution there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas in the country, each having jurisdiction over disputes that arise within its territory. And, the Federal Court went on to say: "As presently advised, there is absent any Federal legislation that confers power upon one High Court to transfer proceedings to the other."

In a latter part of the judgment in that case, his Lordship Gopal Sri Ram JCA pointed out at p. 421:

> The expression 'jurisdiction' is one that takes its colour from its context, and, for that reason, great care must be taken in its use to the facts of a particular case.

The context in which the Federal Court was there speaking did not require it to consider s. 23(1)(b) CJA at all. We are here concerned with the exercise of jurisdiction by this court in the context of a plaintiff bringing suit against several defendants, one of whom has a place of business within the local jurisdiction of this court while the others do not. It is in this context that the question of jurisdiction arises for determination. I do not, therefore, think that the judgment of his Lordship Gopal Sri Ram JCA can

be read in the way counsel for the defendants wishes me to, that is, as saying that in a case such as this where several defendants are sued, and some are resident or have a place of business in Sarawak and some in Malaya, the High Court in Sabah and Sarawak cannot exercise jurisdiction to try the case because the dispute did not arise within its local jurisdiction.

In the second place, I see no justification for giving s. 23(1)(b) a restricted and narrow construction as suggested by counsel for the defendants. Parliament has obviously addressed its mind to a situation such as this where several persons are sued but not all of them reside or have a place of business within the local jurisdiction of the court and it has in its wisdom decided that the court will nevertheless have jurisdiction if one of several of such defendants resides or has a place of business within the local jurisdiction of the court. If that be the case, it would clearly be contrary to express legislative intent to construe s. 23(1)(b) in the manner the defendants wish me to.

In the third place, by the defendants insisting that jurisdiction under s. 23(1)(b) can only arise if the cause of action against all the defendants arise within the local jurisdiction of the court, what they in effect say is that the factor that really determines jurisdiction in every case is where the cause of action arose ie, as stipulated in s. 23(1)(a). In my view, such a construction is clearly contrary to the intention of the legislature in enacting that the provisions of s. 23(1)(a), (b), (c) and (d) are to be read disjunctively by the use of the word "or" between each of these provisions.

In the fourth place, I do not think it can be said that by giving effect to the provisions of s. 23(1)(b) CJA, the High Court in Sabah and Sarawak is "assuming" jurisdiction of a matter emanating from West Malaysia as alleged. There is no need to "assume" jurisdiction. Jurisdiction is conferred by virtue of the fact that one of the defendants has a place of business within the local jurisdiction of the court.

In the fifth place, even on the question of where the causes of action in these suits arose, I do not think the defendants are correct in their contention that the cause of action against them arose in Kuala Lumpur/ Selangor Darul Ehsan, West Malaysia. They are sued on their guarantees, which according to them, are payable on demand. Although in Suit 22-60-2000 the 2nd and 3rd defendants dispute that they have received the letters of demand which the plaintiff caused to be issued against them, they go on to say that "if at all" the said letters of demand were issued against them, it is "probable that the same was directed" to the 2nd defendant at his residential address at Selangor Darul Ehsan and to the 3rd defendant at its registered address at Selangor Darul Ehsan respectively and because

they refused to pay at Selangor Darul Ehsan, the cause of action against them arose in Selangor Darul Ehsan. In Suit 22-43-2000, the 2nd defendant denied that he has received or had sight of the demand made on him.

Now, the guarantees executed by the 2nd and 3rd defendants for the facilities referred to in Suit 22-60-2000 are exhibited as "RHB6 and 7" to the affidavit of Yong Ung Kwong affirmed on 8 December 2000 in that suit. In respect of the guarantees executed by the 2nd defendant in respect of the facilities and lease agreements referred to in Suit 22-43-2000, they are exhibited as "RHB6 and 7" to the affidavit of Yong Ung Kwong affirmed also on 8 December 2000 in that suit. A perusal of those guarantees show that in so far as the 2nd defendant is concerned, his address in the guarantees referred to in both suits is given as No. 25 Upper Lanang Road, 96000 Sibu. As for the 3rd defendant in Suit 22-60-2000, its address is not given but the guarantees referred to in Suit 22-60-2000 contain a clause to the effect that any demand under the guarantee may be sent by ordinary letter post and if sent to the defendants at the address given in the guarantee or to their address last known to the plaintiff, it shall be deemed to have been sufficiently given and assumed to have reached them in the course of post. It is also worth mentioning that in respect of those guarantees signed by the 2nd defendant in respect of the lease agreements mentioned in Suit 22-43-2000, the demand shall be conclusively deemed to have been received within 48 hours after the time of posting despite any evidence to the contrary.

In respect of Suit 22-60-2000, the plaintiff has exhibited as "RHB3 and 4" to the affidavit of Yong Ung Kwong affirmed on 5 October 2000, evidence that it had sent by A.R. registered post letters of demand to the 2nd defendant addressed to him at No. 25 Upper Lanang Road, 96000 Sibu on 15 December 1999, and to the 3rd defendant at Suite 6.2, Level 3, Menara Pelangi, Jalan Kuning 80400 Johore Bahru on 16 December 1999. In respect of Suit 22-43-2000, the plaintiff has exhibited as "RHB1" to the affidavit of Yong Ung Kwong affirmed on 5 October 2000, evidence that it had sent by A.R. registered post a letter of demand to the 2nd defendant addressed to him at No. 25 Upper Lanang Road, 96000 Sibu on 15 December 1999.

Thus, by the terms of the guarantees under which they are sued, refusal to pay by the 2nd defendant would have arisen in Sibu, Sarawak and by the 3rd defendant at Johore Bahru. So, their contention that the cause of action in each suit arose or emanated from Selangor Darul Ehsan is unacceptable to me.

In the sixth place, even on the facts on which the proceedings in both suits are based on are alleged to have occurred, I find that the submission of counsel for the plaintiff represents the position more accurately. The letters of offer of the facilities referred to in both suits may have been issued and signed at Kuala Lumpur by officers at the plaintiff's head office but those letters of offer which are exhibited as "RHB5" to Yong Ung Kwong's affidavit of 8 December 2000 in Suit 22-60-2000 and as "RHB3" to Yong Ung Kwong's affidavit of 3 October 2000 in Suit 22-43-2000, show that the offers were to be accepted at the plaintiff's Sibu branch at Ground Floor, Wisma See Hua, No. 40 Jalan Tuanku Osman, 96000 Sibu, Sarawak and all documents executed there, and, the banking facilities which was to be made available at the plaintiff's Sibu branch was to be actively utilised there (see condition (d) on p. 5/6 of the offers).

In the affidavits of Yong Ung Kwong affirmed on 5 October 2000 in Suit 22-60-2000 and in Suit 22-43-2000 respectively, the plaintiff maintains that: the banking facility granted to the 1st defendant in both suits was fully disbursed by the plaintiff at its Sibu branch; all dealings in respect of the disbursements, payments and usage of the aforesaid facilities were conducted by the respective 1st defendant with the plaintiff at its Sibu branch; the respective 1st defendant's account and records are all maintained at the plaintiff's Sibu branch in respect of the banking facilities offered to them and the material documents and dealings between the respective 1st defendant and the plaintiff took place in Sibu, Sarawak.

From what is described above by Mr. Yong Ung Kwong and given the fact that the banking facilities granted to the 1st defendant in Suit 22-60-2000 consisted of (a) an overdraft for working capital, (b) revolving letter of credit for the import and purchase of machineries/equipment/parts/accessories for the upgrading of the sawmill factory, and (c) foreign exchange contract limit to hedge against fluctuations of foreign exchange rates for trade related transactions and other transactions as approved by Bank Negara Malaysia; while the banking facilities granted to the 1st defendant in Suit 22-43-2000 consisted of (a) bills purchased for trade financing, (b) letter of credit negotiation line for the negotiation of shipping documents drawn under export letters of credit acceptable to the plaintiff, (c) forward foreign exchange contract line which is similar to what is described in (c) above, I would certainly not describe the plaintiff's Sibu branch as a 'mere conduit' for the disbursement of the banking facilities as was made out by counsel for the defendants in submissions.

So, apart from the fact that the letters of offer were issued and signed in the plaintiff's head office and that demands for repayment of those facilities and under the guarantees were issued in Kuala Lumpur by lawyers acting for the plaintiff, everything else relating to those banking facilities occurred in Sibu, Sarawak. I cannot, therefore, agree with the contention of the defendants that the facts on which the proceedings in both suits are based allegedly occurred in Kuala Lumpur. Admittedly some did, but I would say a lot more occurred at Sibu, Sarawak.

It was next contended by the defendants that the High Court, Sibu, is not the proper forum to try these cases on account of the doctrine of *forum non conveniens*. Counsel for the defendants referred me to the cases of *American Express Bank Ltd. v. Mohamed Toufic Al-Ozeir & Anor.* [1995] 1 CLJ 273, *Brinkerhoff Maritime Drilling Corp. & Anor. v. PT Airfast Services Indonesia and Another Appeal* [1992] 2 SLR 776, *Sino Pac Development (Thailand) Ltd. v. Patrick Yap Huan Ju* [1997] 4 CLJ Supp 164 and *Dayasar Corp. Sdn. Bhd. v. CP Ng & Co. Sdn. Bhd.* [1990] 1 CLJ 262; [1990] 2 CLJ (Rep) 11. According to counsel, the fundamental principle of the doctrine of *forum non conveniens* and its operation are that:

(a) there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably or appropriately for the interests of all parties and for the ends of justice;

(b) in considering whether there is another forum which is more appropriate, the court will look for that forum which the action has the most real and substantial connection eg, in terms of convenience or expense, availability and place of residence of witnesses, the law governing the relevant transaction and the place where the parties resided or carried on business;

(c) if the court concluded that there was another forum which is *prima facie* more appropriate, the court would normally order a stay unless there were circumstances militating against a stay, eg, if the plaintiff would not obtain justice in the alternative forum;

(d) the court would also consider whether it would be unjust to confine the plaintiff to remedies elsewhere.

It was the contention of counsel for the defendants that for all those reasons relied on and identified by them (and which I have enumerated above) when discussing their challenge to jurisdiction, these cases have no substantive connection with Sibu, Sarawak, and, therefore, this court is not the proper forum to try them.

I regret I do not agree with this contention. It is quite clear to me, especially from the matters I have referred to when discussing the facts on which these proceedings are based is alleged to have occurred, that as far as the banking facilities granted to the 1st defendant in each suit is concerned, it was accepted at the plaintiff's Sibu branch which also fully disbursed the facility to the 1st defendant there and all dealings in respect of the disbursement, payment and usage of the banking facilities were conducted by the respective 1st defendant with the plaintiff there also. Further, it was at the plaintiff's Sibu branch where the 1st defendant's account and records in respect of the respective banking facility were all maintained. It is, in my view, reasonable to expect that the plaintiff's witnesses in relation to the matters just described are in Sibu and so are the documents. As opposed to that position, the 2nd defendant in both suits says that other than being his own witness, he is "very likely" to be the 1st and 3rd defendants' and the 1st defendant's witness respectively in these actions. But apart from himself he gives no indication whether anyone else from Kuala Lumpur will be a witness for the defendants. Although the 3rd defendant says its business and offices are in Kuala Lumpur and its decision making, business operations, administration and principal officers as well as its records are there, yet with regard to the witnesses it may expect to call to resist the plaintiff's claim herein, I should not lose sight of the fact that its liability and indeed that of the 2nd defendant, arise under a document, namely, a guarantee. Further, while it may be true that the two persons who signed the plaintiff's letter of offer and the lawyer who wrote the letter of demand and the clerk who posted it are from Kuala Lumpur, they only make up some of the witnesses the plaintiff may expect to call.

In my judgment, the forum which has the most real and substantial connection with these cases in terms of subject matter, documentation, the facts giving rise to this action, the principal parties to the borrowing, the potential witnesses at a trial of this action, is Sibu. These matters clearly show that although the 2nd defendant in both suits and the 3rd defendant in Suit 22-60-2000 are based in West Malaysia and would be put to inconvenience and cost in having to attend a trial in Sibu, yet when considered along with the matters I have just referred to, it would mean that to relieve them of their inconvenience, the plaintiff would need to gather up and move all its documents, as well as all its witnesses connected with these cases to Kuala Lumpur. It would be unjust in these circumstances to confine the plaintiff to its remedy at Kuala Lumpur or Shah Alam. It has not been demonstrated, therefore, that these cases may be tried more suitably or appropriately there for the interest of all parties. The ends of justice do not call for me to order a stay of these proceedings

or even worse, to strike it out as suggested by the defendants, even though I do recognise that the last suggestion was prompted by the decision in *Fung Beng Tiat* that "As presently advised, there is absent in any Federal legislation that confers power upon one High Court to transfer proceedings to the other."

I next consider the complaint of all three defendants in Suit 22-60-2000 and the 2nd defendant in Suit 22-43-2000 that the plaintiff had failed to comply with both limbs of O. 6 r. 2(1)(b) RHC.

The first limb of that sub-rule requires that where the claim made by the plaintiff is for a debt of liquidated demand only, the plaintiff must, before issuing the writ, indorse it with a statement of the amount claimed in respect of the debt or demand. The second limb of that same sub-rule requires that in the situation above described, the plaintiff must, before issuing the writ, also indorse it with a statement that further proceedings against the defendant will be stayed if, within the time limited for appearing, he pays the amount so claimed to the plaintiff or his solicitor or into court.

In the two suits before this court, the plaintiff, in causing the writ in each suit to be issued, availed itself to the procedure set out in O. 6 r. 2(1)(a) RHC by indorsing each with a statement of claim. A perusal of each writ shows that the facts giving rise to the plaintiff's cause of action against the defendants in each suit is pleaded in numbered paragraphs, setting out the material facts giving rise to the plaintiff's claim, such as, the dates of the offer of the banking facilities and their acceptance, the terms and conditions on which the facilities were offered, the rates of interest payable in respect of those facilities, the dates upon which the guarantees sued upon were executed and the dates on which demand for repayment of the facilities and under the guarantees were made. In Suit 22-43-2000, the plaintiff's statement of claim also pleads that the 2nd defendant is sued in respect of his liability to RHB Finance Berhad in respect of equipment leased to the 1st defendant and guaranteed by the 2nd defendant. More importantly, in Suit 22-60-2000, para. 11 of the statement of claim states that:

> 11. As at 31.12.1999, the 1st defendant was indebted to the plaintiff in the sum of RM5,188,405.78 with interest thereon at the rate of 3.5% per annum above the Plaintiff's Base Lending Rate calculated on monthly rests from 1.1.2000 until date of full payment.
>
> The Plaintiff's Base Lending Rate as at 31.12.1999 is 6.80% per annum.

The plaintiff then concluded its statement of claim in that suit by para. 15 thereof which states:

> 15. Wherefore, the Plaintiff claims against the Defendants and each of them in the following manner:
>
> **Against the 1st and 3rd Defendants**
>
> (a) the sum of RM5,188,405.78 due as at 31.12.1999 with interest thereon at the rate of 3.5% per annum above the Plaintiff's Base Lending Rate compounded monthly from 1.1.2000 until the date of full payment;
>
> (b) costs on a solicitor-client basis.
>
> **Against the 2nd Defendant**
>
> (a) the sum of RM500,000.00 with interest thereon at the rate of 3.5% per annum above the Plaintiff's Base Lending Rate compounded monthly from 14.12.1999 until the date of full payment;
>
> (b) costs on a solicitor-client basis.

In Suit 22-43-2000, it is similarly stated in para. 29 thereof that:

> 29. As at 31.12.1999, the 1st Defendant was indebted to the Plaintiff in the following sums:
>
> **Overdraft facility**
>
> (a) RM11,282,051.08 with interest thereon at the rate of 3.5% per annum above the Plaintiff's Base Lending Rate calculated on monthly rests from 1.1.2000 until date of full payment;
>
> **Leasing facility**
>
> (b) RM8,183,944.62 (inclusive of principal sum of RM7,831,177.14) with interest thereon at the rate of 17.3% per annum calculated on daily basis from 1.1.2000 to the date of full payment.

The plaintiff then concluded its statement of claim in that suit by para. 33 which states:

> 33. Wherefore, the Plaintiff claims against the Defendants and each of them the following:
>
> (a) the sum of RM11,282,051.08 due as at 31.12.1999 with interest thereon at 3.5% per annum above the Plaintiff's Base Lending Rate compounded monthly from 1.1.2000 until the date of full payment;

(b) the sum of RM8,183,944.62 (inclusive of principal sum of RM7,831,177.14) due as at 31.12.1999 with interest thereon at the rate of 17.3% per annum calculated on daily basis from 1.1.2000 until the date of full payment;

(c) costs on a solicitor-client basis.

Having indorsed the two writs in accordance with the provisions of O. 6 r. 2(1)(a) in the manner aforementioned, the plaintiff did not also indorse the writs in the manner described in O. 6 r. 2(1)(b).

The defendants say that as the plaintiff's claim herein is for a debt or liquidated demand only, then notwithstanding the fact that it had adopted the procedure in O. 6 r. 2(1)(a) RHC, it must also indorse the writ in the manner described in the first limb of O. 6 r. 2(1)(b) ie, with a statement of the amount claimed in respect of the debt or demand and costs. It is the defendants' case that the indorsements mentioned in O. 6 r. 2(1)(a) and O. 6 r. 2(1)(b) are separate and distinct requirements and/or preconditions which are mandatory and must be strictly complied with because O. 6 r. 2 is prefaced by the words "Before a writ is issued it **must** be indorsed ..." In support of their contention, the defendants rely on the case of *Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong* [1996] 3 CLJ 321 where the court interpreted the word "must" which is found in O. 32 r. 13(2) RHC as implying a peremptory mandate as opposed to a mere direction or mandate.

I regret I find no merit in the objection raised by the defendants. The statement of claim found indorsed on these writs and especially para. 11 and the prayers found in the statement of claim indorsed on the writ in Suit 22-60-2000 and para. 29 and the prayers found in the statement of claim indorsed on the writ in Suit 22-43-2000 clearly constitutes a statement of the amount claimed in respect of the debt or liquidated demand allegedly due from the defendants to the plaintiff. Therefore, in a case such as this, where the statement of claim found indorsed on the writ already contained a statement of the amount claimed from the defendants in respect of the debt or liquidated demand allegedly payable by them, there can be no requirement to also make an indorsement in accordance with the provisions of O. 6 r. 2(1)(b) because what is found in the statement of claim indorsed on the writ already satisfied that requirement. In fact this very issue was raised in Sibu High Court Suit No. 22-56-2000 in *Arab-Malaysian Merchant Bank Bhd. v. Dominance Resources Sdn. Bhd. & Anor* [2002] 5 CLJ 1. The two defendants in that suit are the same defendants in Suit 22-43-2000 here. I had in dismissing the objection raised in that case said:

> The question is, does O. 6 r. 2(1)(b) require the plaintiff to do so in a case such as this, where a statement of the amount claimed in respect of the debt or liquidated demand is already contained or set out in the statement of claim and prayers indorsed on the writ? In my judgment, rule 2(1)(b) does not require a separate indorsement because the statement of claim indorsed on the writ already served that purpose and therefore satisfies the requirement of O. 6 r. 2(1)(b). To hold otherwise would only mean that the rules were being adhered to slavishly as it serves no purpose to repeat in a separate indorsement, what is already found indorsed on the same writ. In support of what I say, I would refer to the following passage found in *Atkin's Court Forms* 2nd Edn. Vol. 41 1991 Issue at page 372, paragraph 18 under the heading: "Indorsement of claim for debt or liquidated demand only".
>
> Where the claim made by the plaintiff is for a debt or liquidated demand only, ie, without any other claim being added, a writ must be indorsed before it is issued with a statement of the amount claimed in respect of the debt or demand. **The indorsement will ordinarily take the form of a statement of claim,** and therefore the cause of action giving rise to the debt or demand must be sufficiently, though concisely pleaded, with particulars, stating the date when payment was due. (emphasis added).

I accordingly reject the defendants' complaint raised on this ground.

With regard to the defendants' complaint based on the second limb of O. 6 r. 2(1)(b), a perusal of the writ in Suit 22-43-2000 shows that the indorsement on the writ states that if the 2nd defendant pays the amount claimed from him within "10/20" days of service, proceedings will be stayed. The plaintiff had omitted to cross-out the figure "10". In Suit 22-60-2000, the 2nd and 3rd defendants are required by the indorsement thereon to enter an appearance within 20 days of service of the writ on them. That being the case, the indorsement made in accordance with the second limb of O. 6 r. 2(1)(b) should have allowed them 20 days to pay the amounts claimed against them if they wished proceedings against them to be stayed. Instead, the indorsement states they have ten days to do so.

The abovementioned omissions of the plaintiff has given rise to a complaint by the defendants that the plaintiff is in breach of the second limb of O. 6 r. 2(1)(b) and that such a breach would result in the writ being struck out because the word "must" found in O. 6 r. 2(1) is to be construed as imposing a mandatory and absolute obligation for compliance therewith and does not create the existence of any discretion or empowers the court to exercise its discretion under O. 2 r. 1(2) RHC to cure such breach. In support of the above contention, the defendants rely on the case of *Perbadanan Nasional Insurans Sdn. Bhd. v. Pua Lai Ong (supra).*

It was further submitted on behalf of the defendants that if I formed the view that the court does have a discretion to cure an irregularity in the circumstances disclosed in this case, then there is no basis for that discretion to be exercised in favour of the plaintiff as it has not applied to cure the irregularity and no explanation has been given for the irregularity by reason whereof, there is no material before the court on which discretion may be exercised.

I regret I do not agree with both submissions. In the *Perbadanan Nasional* case, the court was dealing with a breach of O. 32 – relating to the filing and use of affidavits in proceedings. The specific question before the court was stated thus by the court:

> ... we now ask ourselves whether the court has the discretion to allow an affidavit in reply to be used in proceedings under O. 14 despite the fact that such affidavit had not complied with the provisions of O. 32 r. 13(2)(b).

The court answered that question in the following way:

> We answer in the negative for the following reasons.
>
> Order 32 r. 13(2)(b) makes it mandatory for such an affidavit in reply to be filed and served within 14 days from the time the affidavit that it seeks to reply is received. The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion. *To state otherwise would defeat the very purpose O. 32 r. 13(2) was intended ie, to prevent any last minute affidavit being filed so as to protract the hearing of any proceedings in chambers.* (emphasis added)

So, the question before the Court of Appeal in *Perbadanan*'s case was whether there was a discretion to allow an affidavit to be used in summary proceedings under O. 14 when the affidavit had not been served within the very strict timetable laid down by O. 32 r. 13(2)(b) and I have highlighted why the court interpreted the word 'must' the way it did. With respect, the court was there answering a specific question and I do not think the Court of Appeal was there laying down a general rule that whenever the word 'must' appears anywhere else in the rules, that word deprives the court from exercising any discretion to deal with the non-compliance of a particular rule. If I accede to the argument of counsel for the defendants, it would mean that in every case where there is non-compliance with a rule of court in which the word 'must' appears, even a

formal application to excuse such non-compliance would be useless because the word 'must' is to be construed as not creating the existence of any discretion or power in the court to excuse the non-compliance. That this could not have been the intention of the court in *Perbadanan Nasional*'s case is made very clear from the concluding sentence in the judgment which reads:

> We hasten to add that under such circumstances, the defendant may apply for an abridgement of the period required to file the affidavit in reply pursuant to O. 3 r. 5(1) of the RHC.

I, therefore, reject the contention of the defendants that in the factual situation before the court, I do not have a discretion under O. 2 r. 1(2) RHC to cure an irregularity in procedure.

In my judgment, in a case such as this, the approach I should take is that set out by the Federal Court in the case of *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 3 CLJ 305. It was there said by his Lordship Gopal Sri Ram JCA at p. 319:

> The proper approach is for a court to accept that a breach of a rule of court renders the particular proceeding irregular with a power in the court to excuse the non-compliance. That power, as in all matters calling for curial discretion, is to be exercised judicially having regard to the substantial merits of a case and having particular regard to the interests of justice. ... Ultimately, it is the objective perception of a court as to where the justice in a particular case lies that determines whether the irregularity should be cured. If the court decides the particular case to be unfit for the exercise of the curative power, then it may set aside the judgment, order or other proceeding.

In my judgment, the correct position is that stated by Cumming-Bruce LJ in *Metroinvest Ansalt & Ors. v. Commercial Union Assurance Co. Ltd.* [1985] 2 All ER 318 at p. 323:

> As I construe O. 2 r. 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules, the irregular step or document remains irregular *inter partes* until the matter has been brought before the court and the court has decided in which way to exercise the jurisdiction conferred by O. 2 r. 1(2). Order 2 r. 2 does not restrict the power of the court in the sense of restricting its jurisdiction, and does not have the effect of suspending the irregularity until the application under O. 2 r. 2 is made. The purpose and effect of O. 2 r. 2 is to prescribe the procedure if and when an opposite party decides to apply so that the court on recognising the irregularity, may exercise its powers under r. 1(2) by taking the action of killing or curing the irregular proceeding.

Although the court was there dealing with a case involving a judgment in default of appearance, it is quite clear to me from the passage just cited that the court was not confining what it said to any particular type of case.

In fact, in a decision handed down recently in the case of *Maril-Rionebel (M) Sdn. Bhd. & Anor. v. Perdana Merchant Bankers Bhd. and Other Appeals* [2001] 2 CLJ 248, the Court of Appeal dealt with the question of whether a procedural irregularity committed in the presentation of a winding-up petition made the entire proceedings bad. The particular irregularity complained of was that the affidavit of truth was sworn before the presentation of the petition in court. In rejecting the proposition that the irregularity had such an effect, Gopal Sri Ram JCA, speaking for the Court of Appeal referred with approval to what Lord Woolfe MR had said in *Nicholls v. Nicholls* [1997] 147 NLJ 61, about how a court should exercise the discretion vested in it to cure procedural irregularities and which was applied by Mohammed Azmi FCJ in *Lai Yoke Ngan & Anor. v. Chin Teck Kwee & Anor. (supra).* The particular passage in the judgment of Lord Woolfe MR which his Lordship Gopal Sri Ram placed extra emphasis on was that part which dealt with how the court should exercise the discretion vested in it when faced with a procedural defect and reads as follows:

> Like any other discretion, the discretion provided by the statutory provisions, must be exercised in a way which in all the circumstances best reflects the requirements of justice.

His Lordship Gopal Sri Ram then said at p. 265:

> Now, the observations of the Master of the Rolls in *Nicholls v. Nicholls (supra)* were made in the context of a case of contempt of court where the liberty of the subject is at stake. If in those circumstances, procedural irregularities are to be overlooked in the interests of justice, then a *fortiori* in case as the present where there is no question of such a serious consequence. In my judgment, the fact that the affidavit pre-dated the petition by hours or even days does no injustice to anyone. There is accordingly nothing in this point.

So too here, it is my view that the omission of the plaintiff to cross-out the figure "10" in the indorsement in Suit 22-43-2000 and to correctly state "20 days" instead of "10 days" in Suit 22-60-2000 gives rise to a really minor breach of the second limb of O. 6 r. 2(1)(b) RHC. I do not think it has resulted in any prejudice to the defendants. They have not even said that they had intended to pay the amount claimed within 20 days but were unable to do so as they were given 10 days only. It is quite apparent to me that the defendants hope, on the basis of a very minor breach, to

achieve a striking out of the suit. The justice of the case certainly does not call for that as the breach has not resulted in any injustice to them. The breach complained of has, in my opinion, given rise to an irregularity in the proceedings which the court should cure by allowing the 2nd and 3rd defendants in Suit 22-60-2000 and the 2nd defendant in Suit 22-43-2000 20 days from the date their appearance becomes unconditional, to pay the sum claimed should they wish these proceedings to be stayed against them.

With regard to the submission that an irregularity can only be cured if the party in breach has applied to do so and has placed before the court sufficient material to enable it to exercise the discretion vested in it, my reading of O. 2 r. 1 does not indicate any such fetter on the court's discretion. While there is nothing to prevent a party in breach from applying to cure an irregularity, I do not think that the absence of such an application prevents the court from exercising its jurisdiction under O. 2 r. 1 as the court may exercise that power on the facts, materials and circumstances revealed in each case when an application to strike out the particular proceeding is made to the court by the party complaining about such irregularity under O. 2 r. 2 such as here. In this regard, I refer to the last part of the passage of the judgment of Cumming-Bruce LJ in *Metroinvest Ansalt & Ors. v. Commercial Union Assurance Co. Ltd.* already quoted above where his Lordship said "The purpose and effect of O. 2 r. 2 is to prescribe the procedure if and when an opposite party decides to apply so that the court on recognising the irregularity, may exercise its power under r. 1(2) by taking the action of killing or curing the irregular proceeding."

Once the application is before the court, the discretion vested in the court is exercised on the lines described by the learned judges in *Lai Yoke Ngan*'s case, which I have set out above. In the words of Mohammed Azmi FCJ, the discretion "must be exercised in a way which in all the circumstances best reflects the requirements of justice."

I consider next the ground raised by the defendants, that the statement of claim found indorsed on the writ of summons in each suit did not comply with O. 18 r. 6(1) and (4) RHC.

The parts of those two sub-rules which are relevant to the issue at hand read:

> 6.(1) Every pleading in an action must bear on its face:
>
> (a) the year in which the writ in the action was issued and the number of the action;

(b) the title of the action; and

(c) ...

And,

6.(4) Every pleading of a party must be indorsed:

(a) ...

(b) ..., with the name or firm and business address of the solicitor by whom it was served.

With regard to O. 18 r. 6(1)(a) and (b) RHC, what the defendants complain about is that the statement of claim found indorsed on each writ, did not bear on its face the year in which the writ was issued and the number of the action as well as the title of the action. In my judgment, where a statement of claim is indorsed on a writ, it becomes part of the writ on which it is indorsed. Where that happens, it is the face of the writ that will bear the year in which the writ is issued, the number of the action as well as the title of the action. This same objection was raised in the case earlier mentioned by me ie, in Sibu High Court Suit No. 22-56 of 2000. I had there held that:

> In my judgment, the particulars stated in O. 18 r. 6(1)(a) and (b) would need to be stated on the face of a statement of claim only in those instances where a plaintiff has chosen to issue and serve a generally indorsed writ, in which event, the rules require that he must serve on the defendant a statement of claim as a pleading. In support of what I have said regarding a statement of claim becoming a part of the writ on which it is indorsed, I would again refer to *Atkin's Court Forms*, 2nd Edn. Vol. 41 1991 Issue at page 372, paragraph 18 under the heading "Indorsement with Statement of Claim" where it is stated:
>
> > A statement of claim indorsed on a writ is a pleading as well as a writ. It may therefore be amended once without leave, and as it is also part of the writ on which it is indorsed and is served as part of the writ, it may be served at any hour of the day or night.

With regard to O. 18 r. 6(4), it is the complaint of the defendants that the statement of claim found indorsed on the writs should have also been indorsed with the name of the firm and business address of the solicitor by whom it was served but did not. In my judgment, the provisions of O. 18 r. 6(4) would have no application where a statement of claim is found indorsed on a writ because it has become part of the writ on which it is indorsed and the writ will bear an indorsement as to the firm of solicitors which issued the writ and their business address. The provisions

of O. 18 r. 6(4) would, in my judgment, only apply to a statement of claim which is being served on its own as a pleading. In fact this same complaint was also raised in the suit earlier mentioned by me ie, Sibu High Court Suit No. 22-56 of 2000. I had in that case rejected the submission for the same reason as I have here.

I accordingly reject the defendants' complaints based on this ground.

I consider next the complaint of the defendants that the copy of the writ which was served on each of them in respect of each suit was not a sealed copy.

Before addressing the arguments raised on this ground, I first wish to deal with the 2nd defendant's application on this particular ground in Suit 22-43-2000. He complained that the writ which was served on him was not a sealed copy or a copy of the sealed writ but was merely a photocopy. The plaintiff deny this allegation and in the affidavit of Yong Ung Kwong affirmed on 3 October 2000, the affidavit of service of the process server who served the writ on the 2nd defendant is exhibited as 'RHB5'. The process server was one Adnan bin Yunus who affirmed in his affidavit of 22 August 2000 ('RHB5') that he did on 22 August 2000 serve the 2nd defendant with a copy of the sealed writ of summons. The 2nd defendant in his affidavit of 23 November 2000 reiterated that "in any event" a sealed copy of the writ was not served on him.

When the 2nd defendant's application (in encl. 15) in Suit 22-43-2000 came up for hearing, no oral submissions were made on behalf of the 2nd defendant by counsel. Instead, a written submission dated 22 February 2001 was tendered, which I marked as 'C'. From the written submissions on behalf of the 2nd defendant, the point on a photocopy only of the writ being served on him was not taken at all. Although the written submission 'C' does on p. 53 at para. 1(c) mention that service of a photocopy of a writ constitutes bad service, that submission was not made to support the 2nd defendant's complaint. Rather, it was made in the context of what seems to be the real complaint of the 2nd defendant in Suit 22-43-2000 and the 2nd and 3rd defendants in Suit 22-60-2000 that they were not served with a sealed copy of the writ.

Besides the 2nd defendant not having taken the point in submissions, I also find that the allegation remains a bare assertion. The writ was served on the 2nd defendant by way of personal service but in his affidavit of 13 September 2000, he avers that he is "advised by his advocates and verily believes that" the copy of the writ that was served on him was only a photocopy. However, the 2nd defendant makes no averment on what basis

his advocates were able to arrive at that conclusion. In the circumstances, I reject his complaint about being served a photocopy of the writ. I believe that what the 2nd defendant really complains about is that he was not served with a sealed copy of the writ.

I now address the complaint raised by all three defendants that they should have been, but were not, served with a sealed copy of the writ. The submissions made on behalf of the defendants on this point have referred me to the provisions of O. 62 r. 3(a) RHC regarding service of a writ; of O. 6 r. 6(2) and (3) RHC with regard to the procedure for the issuance of a writ by the registry of a High Court and how many copies of the writ are signed and sealed by the registrar on its issuance; various commentaries found in publications on civil procedure in Malaysia and Singapore as well as to *Atkin's Court Forms*, vol. 1, 1992 Issue and to *Halsbury's Laws of England*, 4th edn. vol. 37 on the title *"Issue of a Writ of Summons"*.

It is the submission of counsel for the plaintiff that it was not necessary to serve a sealed writ on the defendants and that the provisions of O. 62 RHC make this clear. All that is required is that a copy of the writ be served, with the sealed copy of the writ being shown to a defendant at the time of service if he so requests it. I agree with that submission of counsel for the plaintiff.

Order 62 r. 3 RHC provides as follows:

> 3. Personal service: How effected. (O. 62 r. 3).
>
> Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left, showing him:
>
> (a) in the case where the document is a writ or other originating process, the sealed copy; and
>
> (b) in any other case, an office copy.

The words of Order 62 r. 3 are clear and unambiguous. There is no requirement to serve a defendant with a sealed copy of the writ.

In fact this same issue and the submissions made on it and the various rules of court and the authorities referred to in the submissions of the defendants were also raised and argued in Sibu High Court Suit No. 22-56 of 2000 between *Arab-Malaysian Merchant Bank Berhad v. Dominance Resources Sdn. Bhd. & Anor*. In fact the 2nd defendant in both suits here was also the 2nd defendant in that suit and counsel who appears here for the 2nd defendant also appeared for him in that suit. I had in that case held, *inter alia*, that when service of a writ is effected by way of personal

service, O. 62 r. 3(a) did not require a sealed copy of the writ to be served – a defendant need only be shown the sealed copy if he requests for it to be shown to him. I had given my reasons for saying so in that case and no useful purpose would be served to repeat them here. I accordingly find no merit in this ground relied upon by the defendants.

Before concluding, there is a submission made on behalf of the defendants which I wish to address. It has to do with the stand taken by the plaintiff in these applications. In seeking to resist them, the plaintiff's stand has been that it has not committed a breach of any of the rules of court but that if it is found that it has, then it is its case that the breach is to be treated as an irregularity which the court may excuse. The defendants say the plaintiff cannot take that stand as to do so would amount to approbating and reprobating. In support, the case of *United Malayan Banking Berhad v. Chew Chee Sun* [1996] 3 CLJ 533 was cited.

I regret I find no merit in this submission. I do not think that in taking the stand it has, the plaintiff can be accused of approbating and reprobating. The plaintiff believes that in bringing this action, it has acted in accordance with the rules of court and it would be most odd and indeed unjust if, in the face of the objections taken by the defendants, the plaintiff cannot take the stand that it has not acted in breach of the rules of court and make submissions to try to persuade the court that it is correct in what it has done but that in the event the court is not with the plaintiff, then to treat any breach of the rules as a curable irregularity. And the plaintiff has been shown to be justified in the stand it has taken because of the several complaints raised by the defendants, it has shown that it has acted correctly in each instance, except for one. With reference to the case of *United Malayan Banking Bhd. v. Chew Chee Sun (supra)*, I did not find that case of any assistance to the defendants as that case is so clearly distinguishable on its facts from what has happened here.

In the result, I dismiss the applications of the 2nd and 3rd defendants in Suit 22-60-2000 with costs to the plaintiff. I also dismiss the applications of the 2nd defendant in Suit 22-43-2000 with costs to the plaintiff. Although I have excused the plaintiff's non-compliance of the second limb of O. 6 r. 2(1)(b) in each suit, I have ordered costs against the defendants in each suit as they also raised other objections in each suit, all of which have failed.